No. 1124.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ROBERT H. FLEMING,
Appellant,

vs.

REUBEN B. DAIGLE,
Appellee.

BRIEF OF APPELLEE.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
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Pernau Press.

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STATEMENT OF THE CASE.

This suit was brought in the United States District Court of Alaska, Third Division, to compel the conveyance of a half interest in a certain mining claim, which claim was made the subject-matter of a contract entered into between the parties hereto on June 16, 1903. The said contract required appellant to "sink" three shafts, or a stated equivalent, to bedrock on said claim between July 1, 1903, and February 1, 1904, in consideration for which "design"

work appellee agreed to transfer a divided half interest in the claim to appellant.

The only contention between the parties in the lower court was upon the question whether appellant performed his obligations under the contract, and so whether he was justified at any time in demanding a conveyance of the half interest in the property.

The cause was tried to the court on July 19, 1904; both parties produced their evidence and rested. The court thereupon reversed its decision and directed briefs to be filed (Trans., p. 8). Six days after the case was closed and submitted on briefs, and but one day before the findings of fact and conclusions of law were filed, and the judgment thereon entered, appellant moved the court for leave to recall and continue the cross-examination of one of appellee's witnesses (Trans., p. 30). The denial of this motion, and the lower court's findings of fact as they were found, and its refusal to find as appellant wished, are assigned as errors on this appeal.

ARGUMENT.

MOTION TO DISMISS THE APPEAL FOR WANT OF JURISDICTION.

Preliminary to a consideration of the merits of the appeal, we would urge upon the attention of the court a jurisdictional question which may probably render such consideration unnecessary.

The record is devoid of any showing as to the value of the subject-matter of the action. The law controlling this phase of the case is found in Carter's Annotated Alaskan Codes, page 252, Section 504, and is as follows:

> "Sec. 504. *Appeals and writs of error, how taken.* Appeals and writs of error may be taken and prosecuted from the final judgment of the district court of the district of Alaska or any division thereof direct to the Supreme Court of the United States in the following cases, namely: * * * and that in all other cases where the amount involved or the value of the subject-matter exceeds five hundred dollars, the United States Circuit Court of Appeals for the ninth circuit shall have jurisdiction to review by writ of error or appeal the final judgments, orders, of the district court."

Because of the jurisdictional character of the point, we apprehend that upon the mere suggestion of it, this court, in the absence of anything to show the requisite value, would, *sua sponte,* dismiss the appeal. Appellee, however, during the first part of January and six weeks before the day set for hearing, filed his motion to dismiss, and sent a copy thereof by registered mail to appellants at Fairbanks, noticing the hearing of the motion for the same day as that set for the hearing on the merits.

We respectfully submit that in the absence of proof that the subject-matter of the controversy is of

$500 value, this court will not be justified in entertaining the appeal.

Parker v. Morrill, 106 U. S. 1;
Bowman v. Railway Co., 115 U. S. 611.

THE MERITS OF THE APPEAL.

We have not been favored with the preparation of a brief by appellant in this case as required by rule 24, and so do not know precisely what claimed errors our opponent would emphasize in support of the appeal. We shall, however, cover the entire field of the assigned errors, inasmuch as the record is not large and the assignments may be classified so as to minimize the consumption of this court's time—always having regard to space and time necessary to properly present the rights of the party whom we represent.

All of appellant's assignments of error, excepting numbers XXI and XXII, are of the class condemned by this court in Last Chance Min. Co. v. Bunker Hill & Sullivan Min. & C. Co., 131 Fed. Rep. 579, 587, 588, and in Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co., 114 Fed. Rep. 417.

In the last-named case this court said:

> "The record contains a bill of exceptions embracing, among other things, various assignments of error, the 2d, 3d, 4th, and 5th of which are to the effect that the trial court erred in making certain of its findings of fact, which findings of fact so complained of these assign-

ments of error respectively set out at large. The 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th 15th, 16th, 17th, 18th, 19th, and 20th assignments of error are to the effect that the court below erred in refusing to make certain findings of fact requested by the defendant to the action. It is very clear that these assignments are unavailing. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive in the appellate court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. Stanley v. Supervisors, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Distilling & Cattle Feeding Co. v. Gottschalk Co. 13 C. C. A. 618, 66 Fed. 609; Cable Co. v. Fleischner, 14 C. C. A. 166, 66 Fed. 899; Consolidated Coal Co. of St. Louis v. Polar Wave Ice Co., 45 C. C. A. 638, 106 Fed. 798."

The proposition is so well settled that we content ourselves with the mere citation of the following additional authorities without taking excerpts from them:

Tyng v. Grinnell, 92 U. S. 467, 468;
Stanley v. Supervisors, 121 U. S. 535, 547;
St. Louis v. Rutz, 138 U. S. 226, 241;
Davis v. Schwartz, 155 U. S. 631, 636;
Dooley v. Pease, 180 U. S. 126, 131;
Singleton v. Felton, 101 Fed. 526, 527;
King v. Smith, 110 Fed. 95, 96;
Pacific, etc., Co. v. Fleischner, 77 Fed. 713, 715.

If this court should consider itself called upon to review the record for the purpose of determining

whether or no the findings are supported by the evidence, we feel perfectly assured that it will find after such examination, not only that the findings are fully supported, but that findings to the contrary, findings such as appellant proposed, would have been in utter disregard of the plain facts, as brought out upon the trial.

The evidence shows clearly:

That plaintiff did not sink three holes to bedrock on the claim in dispute— the condition precedent to the right to the transfer demanded.

Appellee claimed in his notice of location "1320 feet down stream & 330 on each side of the center stake" (Trans., p. 27). It appears, however, that he staked originally "330 plus 117" feet on the lower side (Trans., p. 29). *After* appellant, Fleming, had engaged to sink three holes to bedrock on appellee's ground, and *after* commencing the first hole at a point "*sixty or seventy feet* from the lower side-line"—to quote the words of his own testimony (Trans., p. 9, and again at p. 19)—he conceived the notion of locating the excessive portion along the lower side-line. Hence, on July 14, 1903, "the contract having been made long before", to again quote his testimony (Trans., p. 21) and, as a matter of fact, a month, lacking two days, before—we find him staking the "fraction" and claiming "1320 feet down stream and *140* feet wide off number 6 hillside", the claim in question (Trans., p. 28). Whether such posting of notice and staking of the "fraction" was effective

as giving appellant all of the *140* feet that he thereby claimed or only *117* feet, the excessive width, makes no difference, inasmuch as one of the three holes, which appellant contends satisfied his obligation, was but "sixty or seventy feet from the lower side-line" (Trans., p. 9), and so within the boundaries of the "fraction", as he himself admitted in answer to the court (Trans., p. 20).

This fraction appellant claimed up to the time of trial and even while on the witness stand.

" I *claim* to own the fraction that was there; I " think I ought to have it" (Trans., p. 11), at which late moment his counsel attempted to abandon it (Trans., p. 20).

And aside from the fact that the hole is within the "fraction" boundaries, appellant necessarily claims it, for the only discovery upon which the location of the *fraction* might be predicated was, according to his testimony, a *discovery of gold in the hole in question* (Trans., p. 22).

And so we say, if this court feels itself called upon to examine the evidence, it need look no further than plaintiff's own testimony to justify findings and judgment in favor of defendant.

Saving the one hereinafter referred to, all the remaining assignments of error are attacks upon the conclusions of law, not because such conclusions of law are not justified by the findings of the trial court, but because the facts should have been found dif-

ferently, resulting in different conclusions of law. If (1) appellant will not be, as we contend, permitted to assail the findings, or if (2) as we further contend, the evidence amply supports the findings, there remains but one question: Do the findings support the decree? To this there can be but one answer, we respectfully submit—the prerequisite to the right to demand a conveyance of the half interest not having been established, the transfer will not be compelled.

THE REFUSAL OF THE COURT TO RE-OPEN THE CASE TO PERMIT APPELLANT TO RESUME HIS CROSS-EXAMINATION OF APPELLEE'S WITNESS.

This application came six days after the case was closed and submitted on briefs of counsel (Trans., p. 30) and, we submit, was properly denied.

It is unnecessary to question here the propriety of the proposed cross-examination or the competency of the proposed documentary evidence. Such an application is addressed to the sound discretion of the trial court, and an unabused exercise of such discretion is seldom made the basis of an appeal. The court would have gone to the verge of leniency to have granted the motion to re-open the case so long a time after its submission on briefs, and the refusal of such extreme indulgence cannot be successfully urged here as cause for reversal.

> "Offers of proof" (in this case made regularly before the testimony was closed) "must

be offers of relevant proof, specific, not so broad as to embrace irrelevant and immaterial matter, and made in good faith. The exercise of the discretion of the trial court in rejecting these offers cannot be properly reviewed by us."

Central Pacific Railroad v. California, 162 U. S. 91, 117.

See also:

Means v. Bank of Randall, 146 U. S. 620, 629;

Davis v. Coblens, 174 U. S. 719, 727;

Seymour v. Lumber Co., 58 Fed. (C. C. A.) 957, 960;

Metropolitan St. Ry. Co. v. Davis, 112 Fed. (C. C. A.) 633;

Southerland v. Round, 57 Fed. (C. C. A.) 467, 470.

If the appeal be entertained at all by this court, we respectfully submit that the judgment should be affirmed.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Solicitors for Appellee.